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No. 89-843

In The

Supreme Court of the United States

October Term, 1989

AMERICAN CYANAMID COMPANY
AND ROHM & HAAS COMPANY,

Petitioners,

v.

JAMES E. O'NEIL, IN HIS CAPACITY AS
ATTORNEY GENERAL FOR THE STATE OF
RHODE ISLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should review the decision of the Court below holding the Petitioners jointly and severally liable for the State's indivisible and unapportionable hazardous waste clean up cost pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund Law"), 42 U.S.C. §§ 9601 *et seq.*

2. Whether the Court should review the decision of the Court below which requires that the Petitioners bear the burden of proving their claim that their joint and several liability for the State's hazardous waste clean up costs is divisible and apportionable among the liable parties.

3. Whether the Court should review the finding of fact by the Court below that the haphazard commingling of various unidentified toxic wastes in undeterminable quantities caused indivisible environmental harm at the subject hazard waste dump site.

4. Whether the Court below by its decision to implement the Superfund Law consistent with the decisions of this Honorable Court and the law as expressed by other circuits, violated the *Ex Post Facto* and Due Process Clauses of the United States Constitution.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent James E. O'Neil in his capacity as Attorney General for the State of Rhode Island hereby objects to the Petition for Writ of Certiorari presented by American Cyanamid and Rohm & Haas Company and prays that the Writ be denied.

STATEMENT OF THE CASE

The facts of the case are stated fully in the opinion of the Court of Appeal for the First Circuit (Petitioners' Appendix A) which is reported at 883 F.2d 176 and the opinion of the District Court for the District of Rhode Island (Petitioners' Appendix B) which is reported at 682 F.Supp. 706. Nevertheless, the State feels compelled to correct certain portions of the statement of the case as set forth in the Petition.

The Petitioners correctly point out that a number of settlements were reached prior to trial on this matter. Petition at 7. The Petitioners' description of these settlements, however, tends to create a misimpression. Petitioners dwell on the settlement which was reached with the Capuano defendants whom the State believed could have been shown to be liable for damages as transporters of some of the hazardous materials to the Picillo Site. That settlement required payment of Two Million ($2,000,000.00) Dollars to both the State and the Federal Governments by the Capuanos.

Although the Capuano settlement was the largest cash settlement, the most substantial settlement agreement was dismissed by the Petitioners with a curt reference to "an agreement by [settlors] to undertake soil removal activities at the site". Petition at 7. The agreement to which the Petitioners are referring was part of a settlement entered into by four defendants who, like the Petitioners, generated hazardous waste materials which were linked to the Picillo Site. The four settling generators agreed to accomplish, under governmental supervision, the remaining surface clean up at the site. The

government estimated the cost of this undertaking by the settlors to be at least Three Million Five Hundred Thousand ($3,500,000.00) Dollars. The four generators, General Electric Company, Ashland Chemical Company, GAF Corporation, and Monsanto Company, were also required to pay an additional One Hundred Thousand ($100,000.00) Dollars to the governments as part of the settlement. Thus, pre-trial settlements totalled Five Million Eight Hundred Thousand ($5,800,000.00) Dollars-Two Million Three Hundred Thousand ($2,300,00.00) Dollars in cash for past costs incurred by the state and federal governments, and Three Million Five Hundred Thousand ($3,500,000.00) Dollars in services.

The Petitioners observe that "[s]everal of the generators who settled were not *de minimis* parties . . . ." *Id.* In fact, only one defendant in this action was determined to have *de minimis* status pursuant to 42 U.S.C. §9622(g). That party, Rutgers, the State University of New Jersey, settled for a cash payment to the state and the federal governments of Fifty Thousand ($50,000.00) Dollars. Respondent's Appendix (RA). Rutgers was the only defendant to settle as a *de minimis* party; it contributed only one container of hazardous material to the site and that material had been placed in a larger container and both containers were found intact. Thus, the amount of hazardous substances contributed to the Site by Rutgers and the toxic or hazardous effects of the hazardous substance contributed to the Site by Rutgers are minimal. RA-3.

Petitioners inaccurately described themselves as *de minimis* contributors to the Picillo Site. Petition at i, 9, 10-12, and 16-17. *De minimis* status is conferred upon

parties only by a determination by the President through the Administrator of the Environmental Protection Agency. 42 U.S.C. §9622(g). As to the Petitioners, there could be no finding of *de minimis* status. A determination as to *de minimis* status is made by weighing the cumulative effect of a defendant's contribution to the hazardous waste facility. Each defendant's contribution is considered in light of the other hazardous substances at the site. It is common sense that even though materials may be hazardous independently, combining them may cause a substantially different environmental impact.

At the Picillo Site, there was a commingling of numerous, unidentified toxic materials. The Petitioners contributed experimental herbicides, insecticides, and pesticides produced by their research laboratories. It would be technologically impossible to determine each party's individual share of the cumulative harm caused by the haphazard disposal of various toxic quantities given the synergistic effects which these materials undergo. In addition, we must further complicate our calculations of individual contributions by extrapolating what effect might be caused by the extreme heat which was generated by the huge conflagration which burned out of control for days in one of the chemical lagoons at the site.

Finally, the volumetric contributions which Petitioners brandish are only those barrels which were *"positively attributed"* to them. App. 11a; 883 Fed.2d at 182. The Court below noted that the Petitioners each generated more than Two Thousand (2,000) barrels of wastes and each Petitioner had consigned *all* of its hazardous

material to a single transporter. "Under these circumstances where [Petitioners were] entrusting a substantial amount of waste to a single transporter who ultimately proved unreliable, we simply cannot conclude absent evidence to the contrary, that only a handful of the 2,000 or more barrels reached the Site." App. 13a; 883 F.2d at 182-183. Under these circumstances, the United States was not as brazen as the Petitioners to blindly proclaim the effect of Petitioners' contribution to the Site to be *de minimis*.

Petitioners also attempt to win the sympathy of the Court by a partial recitation of select portions of the findings of fact by the trial court as to Petitioners' role in generating the subject toxic materials. Petition at 3.

For example, they fail to include the trial court's finding that "it is not at all clear that American Cyanamid was as vigilant as it contends." App. 29a; 682 F.Supp. at 723. "American Cyanamid", the trial court found,

> had an exclusive contract with the Chemical Control Facility to handle all of its hazardous waste, including its PCB waste. It continued to utilize the services of this organization despite the presence of an excessive number of drums on the Chemical Corporation site, which in the words of Ralph Wainwright who, as an American Cyanamid Company's supervisor of industrial hygiene and safety, was responsible for disposal of waste, "bothered everybody." In addition, American Cyanamid Company made no further inquiries concerning Chemical Control despite the fact that Mr. Wainwright was aware of an incident in which Chemical Control was linked to barrels of waste which had been improperly disposed of on a vacant lot in Newark, New Jersey. App. 49a; 682 F.Supp. at 723.

Additionally, Petitioner Rohm & Haas has failed to note that in uncontradicted testimony before the trial court, the State established that although Rohm & Haas attempted to remove some of its barrels from the Site, it did not remove all of its hazardous materials, allowing some of its waste to leak into the soil and commingle with other waste. App. 45a; 682 F.Supp. at 721.

The Respondent must also contest the Petitioners' claim that "neither Rohm & Haas nor American Cyanamid consigned any waste materials from their research facilities to the Picillo property for disposal either directly or indirectly." Petition at 3. This precise claim was raised by the Petitioners before the trial court. A party may escape liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund Law"), 42 U.S.C. §9601 *et seq.*, by demonstrating that the act or omission linking the party to a hazardous waste site was "caused solely" by the act or omission of a third-party with whom the defendant does not have "a contractual relationship, existing *directly* or *indirectly*." 42 U.S.C. §9607(b) (emphasis added). The trial court specifically addressed this claim by the Petitioners and found that the third-party defense was unavailable to them because:

> The simple fact is that during the time the defendants consigned their waste to licensed disposers, some of that waste, in identifiable containers, came to rest at the Picillo site. The defendants' argument that there was no evidence linking the disposers to the site or that the defendants had any relationship with whomever actually deposited the waste there simply confuses the nature of its burden under the third-party defense. App. 60a; 682 F.Supp. at 728.

The third-party defense is an affirmative defense in support of which the Petitioners offered no evidence. "Absent any evidence along these lines," the trial court concluded ". . . . it is equally likely that either the licensed disposers or a subcontractor of the disposers deposited the waste at the site." *Id.* There is no support in the record for the Petitioners' assertion of the absence of their direct or indirect responsibility for the disposal of their hazardous waste at the Picillo Site.

Similarly, Respondent takes exception to the Petitioners' characterization of that portion of the judgment of the Court below that imposes liability on the Petitioners for response costs for the clean up of groundwater which may be required at the Site. Contrary to Petitioners' representation, the judgment does not make "Petitioners liable for a blank check on the basis of no evidence". Petition at 22.

As the United States Court of Appeals for the First Circuit noted in response to Petitioners' claim:

> If after conducting the necessary tests, the government concludes that there was in fact no harm to the area's groundwater, then appellants will have nothing to worry about. Moreover, the district court ruled that under Section 107 of the Act [42 U.S.C. § 9607], the State may take only such measures as are cost-efficient. Appellants, therefore, will have an opportunity to challenge the State's chosen remedial measures at the appropriate time. App. 14a; 883 F.2d at 183.

Such a judgment can hardly be called a "blank check".

REASONS FOR DENYING THE WRIT

I. Review of the alleged inequities of CERCLA would be premature at this time.

"[T]he legislative history," the Court observed in *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 808 (S.D. Ohio 1983), "evinces the intent that the scope of liability under CERCLA, 42 U.S.C. §9607, be determined from traditional and evolving principles of common law . . . ." The *Chem-Dyne* court and numerous lower courts have found that those principles support the imposition of joint and several liability upon defendants found liable under 42 U.S.C. §9607(a) where the harm or threat of harm to which the government responses, is "indivisible". 572 F.Supp. at 810. *Chem-Dyne* also held that:

> if a party seeks to limit the scope of liability by a claim that the harm is apportionable, the burden of proof rests with those defendants. *Id.*

Interestingly, the *Chem-Dyne* decision observes that "the volume of waste of a particular generator is not an accurate predictor of the risk associated with the waste because the toxicity or migratory potential of a particularly hazardous substance generally varies independently with the volume of the waste." *Id.* at 811.

In 1986, when it considered the Superfund Amendments and Reauthorization Act ("SARA"), 100 Stat. 1613, Congress had the opportunity to reexamine the liability scheme established, and the possible inequities created, with the enactment of CERCLA in 1980. Congressman Eckart, one of the key sponsors of SARA, proclaimed that SARA "maintains the strict, joint and several standards of current law as enumerated in the leading case, *United*

States v. Chem-Dyne Corporation". 132 Cong. Rec. H9624 (daily ed. Oct. 8, 1986). Similarly, Congressman Dingell, the primary draftsman of SARA in the House of Representatives announced that the intent of SARA was "maintaining the liability of the 1980 act as it has been interpreted by the federal court." 132 Cong. Rec. H9563 (daily ed. October 8, 1986).

Congress considered the possible inequities which might arise from the imposition of joint and several liability. Significantly, Congress rejected efforts to institute a mandatory apportionment scheme that would have prevented joint and several liability on the basis of considerations like waste volume. Senator Mitchell explained:

> One proposed change to this law is a mandatory apportionment scheme under which the burden of proof would fall on the Government to establish the portion of the harm for which each party is responsible, and apportion the cleanup costs accordingly. While this may have a surface appeal, the impacts of such a change on the Superfund Enforcement Program would be far-reaching. 131 Cong. Rec. S11586 (daily ed. Sept. 17, 1985).

The Senator opined that a mandatory apportionment scheme "would delay cleanups and increase costs." *Id.*

SARA explicitly provides a potentially liable party with the right to institute a contribution action to alleviate disproportionate imposition of costs by obtaining contribution from other liable parties.

Section 113(f)(i) of SARA (42 U.S.C. §9613(f)(i)), provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure and shall be governed by Federal Law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9060 of this title or section 9607 of this title.

The legislative history clearly establishes Congressional intent to allow such factors as the volume of the waste to be considered in post-liability contribution actions. However, volume was not to be employed in the determination of liability. The Report of the House Judiciary Committee made clear that, "after all questions of liability and remedy have been resolved, courts may consider any criteria relevant to determining whether there should be apportionment." H.R. Rep. 99-253, 99th Cong., 1st Sess., Part 3 at 19 (1985). Allocation criteria suggested by the Committee for use in contribution actions included "the amount of hazardous substances involved," as well as degree of toxicity, degree of involvement by the parties, and other equitable factors. *Id.* However, the report made explicit that such factors were to be employed in contribution actions but not in the determination of joint and several liability. Indeed, to avoid confusion between the possible "apportionment" of a divisible injury (which would make the imposition of joint and several liability

inappropriate) and the possible "allocation" of costs in a contribution action, Congress carefully chose to employ the word "allocate" rather than "apportion" in 42 U.S.C. § 9613(f). Senator Stafford stated that:

> The amendment does not diminish the liability of any person under CERCLA nor does it suggest that anything other than the standard of liability which has been held by the courts to apply, continue to be applied. Indeed, as originally drafted, the Senator's amendment contained the word "apportion" for which we agreed to substitute "allocate" in order to avoid any possible confusion on this point. 131 Cong. Rec. S12021 (daily ed. Sept. 24, 1985).

The questions presented for review do not question the finding by the Court below that the Petitioners are liable for the clean up of the hazardous waste site at the Picillo Pig Farm pursuant to the Superfund Law. 42 U.S.C. §§ 9601 *et seq*. Rather, the Petitioners seek review in order to challenge the extent of that liability and the alleged inequities created by the imposition of joint and several liability. Even if the Petitioners are victims of the inequities alleged in their petition, the Petitioners possess the statutory mechanism to ensure that their financial burden will be shared by others whom the Petitioners believe are also at fault. Such a contribution action, styled *American Cyanamid v. King Industries*, C.A. No. 87-0110, in which the Petitioners have named seventeen (17) parties as defendants, is currently pending in the United States District Court for the District of Rhode Island before Senior Judge Raymond J. Pettine who served as the trial judge in the instant action.

The State respectfully submits that the granting of review by writ of certiorari at this time is premature. The Court would be in a better position to gauge the alleged "inequities" of the Congressionally established Comprehensive Environmental Response, Compensation and Liability System if the system were allowed to proceed through to conclusion in the manner intended by Congress.

II. The sole Constitutional issue which the Petitioners present for review is limited to the question of the constitutionality of the State's efforts to recover hazardous waste site clean up costs incurred prior to the enactment of the Superfund Law in 1980 and, thus, is not an issue which is an important and recurring problem.

The Petitioners seek to obtain review of the decision of the Court below allowing the government to recover its pre-enactment response costs. The Petitioners' focus is very narrow. The Petitioners have conceded, as they must, the constitutionality of the imposition of liability for response costs incurred after CERCLA's enactment but caused by pre-enactment conduct.

The Petitioners only seek review of the decision of the Court below allowing recovery of response costs incurred prior to the enactment of the Superfund Law. CERCLA was signed into law in 1980. The State submits that the number of cases involving an effort to recover response costs incurred prior to 1980 is insignificant and will be decreasing.

Additionally, there is no conflict in the law as expressed by the courts of appeal which have addressed the issue of the imposition of liability for pre-enactment costs. *United States v. Monsanto Company*, 858 F.2d 160, 173 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3156 (1989); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 734 (8th Cir. 1986) *cert. denied*, ___ U.S. ___, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

The decision of the Court below, and the opinions of the Fourth Circuit in *Monsanto* and the Eight Circuit in *Northeastern Pharmaceutical* relied upon the Court's seminal decision on retroactivity in *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1 (1976). "The retroactive aspect of legislation," the Court held in *Turner Elkhorn*, "as well as the prospective aspects, must meet the test of due process, and the justification for the latter may not suffice for the former". *Id.* at 16-17. Applying the reasoning of *Turner Elkhorn* in *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717, 730 (1984), the Court ruled that "that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."

CERCLA was intended to distribute the cost of the clean up of hazardous waste sites. Thus, *Turner Elkhorn* is particularly instructive:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an

> arbitrary and irrational way. 429 U.S. at 15. (Citation omitted.)

Amplifying upon *Turner Elkhorn* in *Pension Guaranty*, the Court stated that:

> [In *Turner Elkhorn*, the Court held] that the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgment about the wisdom of such legislation remains within the exclusive province of the legislative and executive branches. 467 U.S. at 729.

Congressional intent to have CERCLA apply retroactively is clear. As pointed out in *United States v. Northeastern Pharmaceutical & Chemical Company*, 810 F.2d 726, 733 (8th Cir. 1986), "[t]he language used in the key liability provision, CERCLA 107, 42 U.S.C. § 9607, refers to actions and conditions in the past tense. . . . Further the statutory scheme itself is overwhelmingly remedial and retroactive." Additional support may be found in S. Rep. 96-848, 96th Congress, 2nd Sess., p. 13 [1980] ("society should not bear the costs of protecting the public from hazards produced in the past by a generator . . . ").

It is eminently rational for Congress to have concluded that the manufacturers who generated toxic waste which was improperly disposed of should bear the cost for cleaning it up.

The State, therefore, suggests that the question of the constitutionality of the imposition of liability for pre-enactment costs is not an important and recurring problem which is worthy of the Court's review.

III. The Decision of the Court Below is Consistent With The Law As Expressed by Other Courts Of Appeals.

Section 433(B)(2) of the *Restatement of Torts* provides:

> Where the tortious conduct of two or more actors have combined to bring about harm to Plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor. *Restatement (Second) of Tort* § 433(B)(2) (1965).

Consistent with the *Restatement*, the Defendants in *Monsanto* and *Chem-Dyne*, 572 F.Supp. at 810, and the Petitioners in the Court below were required to bear the burden of establishing a reasonable basis for dividing harm and apportioning liability among responsible parties.

The parameters of that responsibility are set out in Section 433A of the *Restatement* which provides:

> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) There are distinct harms, or
>
> (b) There is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes.
>
> *Restatement (Second) of Torts*, § 433A.

As the Petitioners indicate on page 2 of their Petition, the Picillo dump site was a "classic 'midnight dump' site". It was an illegal dump site at which some toxic

wastes were emptied from barrels into unlined lagoons and other hazardous substances were buried in the earth while still in their barrels which were indiscriminately stacked upon other barrels. These barrels were crushed and allowed to corrode causing their vile contents to ooze out and commingle. The State only learned of the existence of the facility when an explosion ignited a fire in one of the lagoons that burned out of control for days. The true extent of the disposal operation did not become apparent until after the excavation and removal of the barrels began. Obviously, no shipping manifests providing the State with information concerning the origin, chemical composition or volume of material at the Site were available.

The hazardous waste "facility" on the Picillo Pig Farm was primitive and remarkably similar to the two hazardous waste facilities which were considered by the courts in *United States v. Monsanto Co.*, and *United States v. Medley*, 25 ERC 1315 (D.S.C. 1986) to present indivisible and unapportionable damage warranting the imposition of joint and several liability. Both the Appellants in *Monsanto* and the Petitioners in the case at bar claimed apportionability of the harm but:

> presented no evidence however showing a relationship between waste volume, the release of hazardous substances, and the harm at the site. Further, in light of the commingling of hazardous substances, the district court could not have reasonable apportioned liability without some evidence disclosing the individual and interactive qualities of the substances deposited there. Common sense counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few

> pints of others improperly mixed could result in disaster consequences. 858 F.2d at 172 (footnotes omitted).

The Fourth Circuit in *Monsanto* also had the opportunity to pass upon a panoply of constitutional challenges which went to the core of the Superfund Law, and found that the Act passed Constitutional muster on each challenge:

> Nor does the imposition of strict, joint and several liability convert CERCLA into a bill of attainder or an *ex post facto* law. *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 214 (W.D. Mo. 1985); *United States v. Tyson*, 25 Env't. Rep.Cas. (BNA) 1897 (E.D.Pa. 1986) [available on WESTLAW, 1986 WL 9250]. The infliction of punishment, either legislatively or retrospectively, is a *sine qua non* of legislation that runs afoul of these constitutional prohibitions. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 473-84, 97 S.Ct. 2777, 2805-11, 53 L.Ed.2d 867 (1977) (bill of attainder analysis); *Weaver v. Graham*, 450 U.S. 24, 28-30, 101 S.Ct. 960, 963-65, 67 L.Ed.2d 17 (1981) (ex post facto law analysis). CERCLA does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent. *Cf. Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 1838, 95 L.Ed.2d 365 (1987) (distinguishing civil penalties under Clean Water Act from equitable remedy of restitution). Moreover, as this case amply demonstrates, Congress did not impose that obligation automatically on a legislatively defined class of persons. *Id.* 858 F.2d at 175.

The State would suggest that the concerns raised by the Petitioners were raised in the Court below and were fairly and accurately ruled upon. Further, the whole of the CERCLA system has been reviewed in detail and the decision of the Court below is consistent with the law as expressed by other Courts of Appeals.

CONCLUSION

For the above reasons, Respondent James E. O'Neil, in his capacity as Attorney General of the State of Rhode Island, respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

James E. O'Neil, in his capacity as Attorney General for the STATE OF RHODE ISLAND Plaintiff, v. Warren V. Picillo, Sr., Rutgers, the State University of New Jersey, Defendants.	Civil Action No. 83-0787 P
UNITED STATES OF AMERICA Plaintiff, v. Rutgers, the State University of New Jersey, Defendants,	CA 89-0123 Civil Action No. ___

CONSENT DECREE

WHEREAS, the United States of America, on behalf of the Administrator of the United States Environmental Protection Agency ("Plaintiff" or "United States") filed a complaint against Rutgers, the State University of New

Jersey ("Rutgers"), pursuant to Sections 106 and 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 42 U.S.C. §§ 9606 and 9607(a) ("CERCLA"), and Section 7003 of the Resource Conservation and Recovery Act, ("RCRA"), as amended, 42 U.S.C. § 6973, seeking injunctive relief regarding the cleanup of the Picillo site in Coventry, Rhode Island (the "Site") and recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Site;

WHEREAS, there is also pending an action entitled *O'Neil v. Picillo, et al.*, designated C.A. No. 83-0787P in the Federal District Court for the District of Rhode Island against Rutgers and certain other companies and persons seeking relief under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and Section 311 of the Clean Water Act, 33 U.S.C. § 1321, relating to the disposal of waste and other activities at the Site (the "Federal Court Action");

WHEREAS, there is pending an action entitled *Bendick, et al. v. Picillo, et al.*, designated C.A. No. 77-3161 in the Superior Court for the State of Rhode Island, Providence County, against Rutgers and certain other companies and persons asserting claims and seeking relief under the statutory and common law of the State of Rhode Island relating to the disposal of waste and other activities at the Site (the "State Court Action");

WHEREAS, the United States and the State have incurred and continue to incur response costs in responding to the release or threat of release of hazardous substances at or in connection with the Site;

WHEREAS, the United States and the Attorney General for the State of Rhode Island have determined that prompt settlement of this case is practicable and in the public interest;

WHEREAS, this settlement involves only a minor portion of the response costs at the Site with respect to Rutgers;

WHEREAS, the United States and the State have determined that the amount of the hazardous substances contributed to the Site by Rutgers and the toxic or hazardous effects of the hazardous substance contributed to the Site by Rutgers are minimal in comparison to other hazardous substances at the Site;

WHEREAS, the United States, the State and Rutgers agree that settlement of this case without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action;

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED as follows:

I. JURISDICTION

This Court has jurisdiction over the subject matter and the parties to this action. The parties agree to be bound by the terms of this Consent Decree and not to contest its

validity in any subsequent proceeding to implement or enforce its terms.

II. PARTIES BOUND

This Consent Decree shall apply to and be binding upon the United States and the State and shall apply to and be binding upon Rutgers, its directors, officers, employees, agents, successors and assigns. Each signatory to this Consent Decree represents that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to legally bind the Party represented by him or her.

III. STATEMENT OF PURPOSE

The purpose of Rutgers entering into this Consent Decree is to: (1) provide partial reimbursement for Plaintiffs' Response Costs; and (2) settle any and all claims asserted by Plaintiffs as to Rutgers in the Complaint filed in this matter, as well as Plaintiffs' potential claims for natural resource damages under CERCLA, with the exception of Plaintiffs' claims specifically reserved in this Decree.

IV. PAYMENT

1. On or before the 30th day following entry of this Consent Decree, Rutgers shall send a certified check to the United States in the amount of $37,500. Payment shall be made by a certified check payable to the "Enviornmental Protection Agency, Hazardous Substance Superfund".

2. The check shall reference Rutgers, the Site name, and the civil action number of this case, and shall be sent to:

EPA Superfund
P.O. Box 371003M
Pittsburgh, Pennsylvania 15251

3. Rutgers shall simultaneously send a copy of its check to:

Chief, Environmental Enforcement Section
Land and Natural Resources Division
United States Department of Justice
9th and Pennsylvania Avenues, N.W.
Washington, D.C. 20530
Attn: DOJ No. 90-11-2-131
and
Regional Administrator
U.S. Environmental Protection Agency
J.F.K. Federal Building
Government Center
Boston, MA 02203
Attn: Picillo Settlement

A copy shall also be sent to:

State of Rhode Island
Department of Environmental Management
9 Hayes Street
Second Floor
Providence, Rhode Island 02908
and
Attention: Gary Powers
State of Rhode Island
Department of Attorney General
72 Pine Street
Providence, RI 02903

4. On or before the 30th day following entry of this Consent Decree, Rutgers shall send payment in the amount of $12,500 to the State of Rhode Island by certified check, payable to "Treasurer, State of Rhode Island, for Deposit in the Environmental Response Fund." Payment shall be mailed to:

Department of Environmental Management
9 Hayes Street, 2nd floor
Providence, Rhode Island 02908

A copy shall also be sent to:

Attention: Gary Powers
State of Rhode Island
Department of Attorney General
72 Pine Street
Providence, RI 02903

5. The payments described above are partial reimbursement for Plaintiffs' response costs and are not a penalty or fine.

V. CIVIL PENALTIES

In addition to any other available remedies or sanctions, should Rutgers fail or refuse to comply with any term or condition of this Consent Decree, it shall be subject to a civil penalty of up to $25,000 per day of such failure or refusal pursuant to Section 122(1) of CERCLA, 42 U.S.C. 9622(1).

VI. CERTIFICATION OF DEFENDANTS

Rutgers certifies that to the best of its knowledge and belief, it has provided to the United States and the State all information currently in its possession, or in the possession of its officers, directors, employees, contractors, agents or assigns, which relates in any way to the generation, treatment, transportation, storage or disposal of hazardous substances at or in connection with the Site.

VII. COVENANT NOT TO SUE

1. Subject to the reservation of rights in Section VIII of this Consent Decree, the United States and the State covenant not to sue or take any other civil or administrative action against Rutgers for "Covered Matters." "Covered Matters" shall include any and all civil liability including future liability, for reimbursement of response costs or for injunctive relief pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a), Section 311 of the Clean Water Act, 33 U.S.C. § 1321, and Section 7003 of RCRA, 42 U.S.C. § 6973, with regard to the Site. "Covered Matters" shall also include all past or future damages for injury to, destruction of, or loss of natural resources, including the costs of assessing such injury, destruction, or loss.

2. In consideration of the United States' and the State's covenant not to sue in Paragraph 1 of this Section, Rutgers agrees not to assert any claims or causes of action against the United States, the State, or the Hazardous Substance Superfund arising out of the Covered Matters, or to seek any other costs, damages, or attorneys' fees arising out of response activities at the Site.

3. The State hereby agrees to file a motion seeking the dismissal with prejudice of *O'Neil v. Picillo* and *Bendick v. Picillo* as to Rutgers. The State and Rutgers further agree that this dismissal is a final disposition of all claims raised in those actions against Rutgers with the exception of those claims set forth in the reservation of rights in Section VIII, Paragraphs 1 and 2 of this Consent Decree.

VIII. RESERVATION OF RIGHTS

1. Nothing in this Consent Decree is intended to be nor shall it be construed as a release or covenant not to sue for any claim or cause of action, administrative or judicial, past or future, in law or in equity, which the United States and/or the State may have against Rutgers for:

(a) any continuing liability as a result of failure to make the payments required by Section IV, Paragraphs 1 and 4, of this Consent Decree, or

(b) any matter not expressly included in Covered Matters.

Nothing in this Consent Decree is intended to be nor shall be construed as a release of criminal liability.

2. Nothing in this Consent Decree constitutes a covenant not to sue or to take action or otherwise limit the ability of the United States and/or the State to seek or obtain further relief from Rutgers, and the covenant not to sue in Section VII, Paragraph 1, of this Consent Decree is null and void, if information not currently known or made available to the United States and/or the State is discovered which indicates that Rutgers contributed hazardous substances to the Site in such greater amount or to such greater toxic or other hazardous effect that the Rutgers no longer qualifies as a *de minimis* party at the Site because it contributed disproportionately to the cumulative toxic or other hazardous effects of the hazardous substances at the Site.

3. Nothing in this Consent Decree is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, past or future, in law or in equity, which the United States and/or the State may

have against any person, firm, corporation or other entity who is not a signatory to this Consent Decree.

4. The United States, the State, and Rutgers agree that the actions undertaken by Rutgers in accordance with this Consent Decree do not constitute an admission of any liability by Rutgers.

IX. CONTRIBUTION PROTECTION

Subject to the reservation of rights in Section IX of this Consent Decree, the United States and the State agree that by entering into and carrying out the terms of the Consent Decree, Rutgers will have resolved its liability to the United States and the State for Covered Matters pursuant to Section 122(g)(5) of CERCLA, 42 U.S.C. § 9622(g)(5), and shall not be liable for claims for contribution for Covered Matters.

X. PUBLIC COMMENT

This Consent Decree shall be subject to a thirty-day public comment period. The United States or the State may withdraw its consent to this Consent Decree if comments received disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate.

XI. EFFECTIVE DATE

The effective date of this Consent Decree shall be the date of entry by this Court, following public comment pursuant to Section X of this Consent Decree.

ENTERED this 2nd day of May, 1989.

/s/ Raymond J. Pettine
UNITED STATES DISTRICT JUDGE

FOR THE UNITED STATES OF AMERICA

/s/ Donald Carr
DONALD A. CARR
Acting Assistant Attorney General Land and Natural Resources Division United States Department of Justice
Washington, D.C
20530

LINCOLN C. ALMOND
United States Attorney
District of Rhode Island

By:/s/ Everett Sammartino
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Providence, Rhode Island
02903

/s/ Carrick Brooke-Davidson
CARRICK BROOKE-DAVIDSON, Attorney
Environmental Enforcement Section United
States Department of Justice
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Ben Franklin Station
Washington, D.C. 20044

/s/ Thomas L. Adams, Jr.
THOMAS L. ADAMS, JR.
Assistant Administrator for
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/s/ Michael R. Deland
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/s/ Jon Fleuchaus 5/24/88
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Boston, MA 02203

FOR THE STATE OF
RHODE ISLAND

/s/ James E. O'Neil
JAMES E. O'NEIL, in his capacity as Attorney General for the State of Rhode Island

By His Attorney,

JAMES E. O'NEIL
ATTORNEY GENERAL

By:/s/ Gary Powers
GARY POWERS
Special Assistant
Attorney General
72 Pine Street
Providence, RI 02903
(401) 274-4400

FOR RUTGERS UNIVERSITY

/s/ Joseph P. Whiteside
Joseph P. Whiteside
Senior vice President
and Treasurer

/s/ Thomas Terp
Thomas Terp
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HOLLISTER
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